Constitutional Law—ENTITLEMENT DOCTRINE—MICHIGAN COMPULSORY NO-FAULT AUTOMOBILE INSURANCE LAW VIOLATES DUE PROCESS—*Shavers v. Attorney General*, 402 Mich. 554, 267 N.W.2d 72 (1978).

Recent actions by courts and Congress have caused some commentators to conclude that the "death knell" of no-fault insurance has sounded.[1] The most significant case to date finding a portion of a state no-fault plan unconstitutional is the decision of the Michigan Supreme Court in *Shavers v. Attorney General*.[2] Although the court found the overall purposes of the Michigan No-Fault Act[3] constitutional, the actual mechanisms for providing the compulsory automobile insurance were adjudged deficient. The failure of the mechanisms to provide essential procedures to guarantee fair insurance rates and the proper availability of insurance was held to deprive citizens of due process of law under the Michigan and United States Constitutions. The Michigan court is the first to hold a no-fault plan's regulatory scheme unconstitutional on that ground.

The plaintiffs in *Shavers* brought the suit as a class action before Michigan's No-Fault Act became effective, seeking a declaratory judgment concerning the constitutionality of the Act and an injunction against its enforcement. The No-Fault Act went into effect[4] while the case was in the lower courts and had been in effect for five years when the supreme court made its decision.

The supreme court found constitutional the Act's requirements of personal injury and property damage protection. The Act's requirement of residual liability insurance and the exclusion from coverage of two-wheeled motor vehicles were also judged constitutional. The supreme court remanded the issues concerning the constitutionality of the Act's work-loss and replacement services reimbursement schemes and its provisions concerning nonresident motorists for further evidentiary development.

Despite the court's finding that compulsory no-fault insur-

1. *Michigan no-fault ruling endangers federal bill*, 64 A.B.A.J. 955 (1978); 21 ATLA L. REP. 242 (1978); 47 U.S.L.W. 2088 (1978).

2. 402 Mich. 554, 267 N.W.2d 72 (1978).

3. MICH. COMP. LAWS ANN. § 500.3101-.3179 (West Supp. 1979-1980).

4. The No-Fault Act became effective on October 1, 1973. MICH. COMP. LAWS ANN. § 500.3101 (West Supp. 1979-1980).

ance could constitutionally be required, the court held that "the actual mechanisms for protecting the welfare of individual Michigan motorists, required by law to purchase no-fault insurance, are constitutionally deficient in failing to provide due process."[5] Specifically, the court found the Act to be deficient for failure to protect against "excessive, inadequate, or unfairly discriminatory" rates, and failure to establish procedures whereby motorists could challenge individual rating decisions. The Act also failed to provide procedures enabling motorists to challenge refusal or cancellation of insurance, or consignment to the "Automobile Placement Facility," an assigned risk plan.[6] In examining the regulatory scheme, the court considered not only the No-Fault Act itself, but also other provisions of the Michigan Insurance Code dealing with rates and ratemaking.[7]

I. BACKGROUND

A. Due Process Challenges to State No-Fault Plans

Many arguments based on the right to due process of law have been unsuccessfully advanced in challenges to state no-fault plans.[8] The most common due process arguments focus on the

5. 402 Mich. at 580, 267 N.W. 2d at 77 (emphasis deleted).

6. *Id.*, 267 N.W.2d at 78. An "assigned risk" plan is a method whereby drivers who cannot obtain insurance through normal methods, because their applications for insurance have been denied or their insurance policies have been cancelled, are assigned to insurers by a method of rotation or proration. R. KEETON & J. O'CONNELL, BASIC PROTECTION FOR THE TRAFFIC VICTIM 569-70 (1965).

7. 402 Mich. at 600-03, 267 N.W.2d at 87-88.

8. Many challenges to state no-fault plans have been advanced on grounds other than due process. *See, e.g.*, Gentile v. Altermatt, 169 Conn. 267, 363 A.2d 1 (1975), *appeal dismissed*, 423 U.S. 1041 (1976) (right to trial by jury, unconstitutional abolition of a common law right of action, equal protection, fifth amendment protection against self-incrimination); Lasky v. State Farm Ins. Co., 296 So. 2d 9 (Fla. 1974) (right to travel freely, right to trial by jury, right of access to the courts, collateral source rule, equal protection, nonresident motorist provision); Andrews v. State, 238 Ga. 433, 233 S.E.2d 209 (1977) (equal protection, first amendment freedom of religion); Manzanares v. Bell, 214 Kan. 589, 522 P.2d 1291 (1974) (right to travel freely, right to trial by jury, unconstitutional abolition of a common law right of action, vagueness and overbreadth, equal protection, criminal sanctions an unlawful delegation of legislative power, nonresident motorist provision); Fann v. McGuffey, 534 S.W.2d 770 (Ky. 1975) (right to trial by jury, right of access to the courts, unconstitutional abolition of a common law right of action, collateral source rule, equal protection, state constitutional provision prohibiting special legislation when general legislation is appropriate, nonresident motorist provision); Pinnick v. Cleary, 360 Mass. 1, 271 N.E.2d 592 (1971) (right to trial by jury, right of access to the courts, unconstitutional abolition of a common law right of action, collateral source rule, vagueness and overbreadth, equal protection, separation of powers); Opinion of the Justices, 113 N.H. 205, 304 A.2d 881 (1973) (right to trial by jury, right of access to the courts,

scheme's perceived deprivation of property, the requirement of mandatory insurance, and the provisions allowing a policyholder to determine some rights on behalf of his or her household, minor child, or legally incapacitated ward.[9]

Two state court decisions have examined the key issue in *Shavers*—the constitutionality of the regulatory scheme that implements a particular no-fault plan. In *Pinnick v. Cleary*,[10] the first case to consider a challenge to a state no-fault automobile

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equal protection); Rybeck v. Rybeck, 141 N.J. Super. 481, 358 A.2d 828 (1976) (right to trial by jury, right of access to the courts, equal protection, unconstitutional limitation of damages); Montgomery v. Daniels, 38 N.Y.2d 41, 340 N.E.2d 444, 378 N.Y.S.2d 1 (1975) (right to trial by jury, unconstitutional abolition of a common law right of action, vagueness and overbreadth, equal protection); Singer v. Sheppard, 464 Pa. 387, 346 A.2d 897 (1975) (unconstitutional limitation of damages).

Successful challenges to state no-fault plans on grounds other than due process have been made in Florida, Illinois, New Hamsphire, and Michigan. The Florida Supreme Court determined that a provision allowing victims who received an injury involving fracture to a weight-bearing bone to sue in tort, though their expenses did not exceed the $10,000 threshold, while those with soft-tissue injuries had to meet the threshold, created an unreasonable and arbitrary classification in denial of equal protection. Lasky v. State Farm Ins. Co., 296 So. 2d 9 (Fla. 1974). The Florida court had previously found that a provision abolishing tort recovery for property damage less than $550 deprived plaintiffs of access to the courts. Kluger v. White, 281 So. 2d 1 (Fla. 1973).

The Illinois Supreme Court, in Grace v. Howlett, 51 Ill. 2d 478, 283 N.E.2d 474 (1972), ruled that classification of victims based on the type of vehicle that caused their injury violated a state constitutional provision requiring a general law instead of a special law, if possible, and denied recovery on an arbitrary basis. In addition, the Illinois court found that the no-fault plan's compulsory arbitration provisions violated a state constitutional mandate that there be no fee officers in the judicial system, and denied plaintiffs trial by jury.

The New Hampshire Supreme Court also found fault with a compulsory arbitration plan in an advisory opinion regarding the constitutionality of the state's no-fault legislation. Opinion of the Justices, 113 N.H. 205, 304 A.2d 881 (1973). The court held that the legislature could not constitutionally impose arbitration on cases involving less than $3000 or require payment of arbitration costs as a condition precedent to appeal.

The Michigan Court of Appeals ruled that the provision requiring reduction of no-fault benefits by amounts payable under state or federal law violated equal protection by discriminating against those with no private insurance in addition to no-fault coverage. The court implied that a rule requiring the offset of no-fault benefits only by amounts received as workmen's compensation would survive judicial scrutiny. O'Donnell v. State Farm Mut. Auto. Ins. Co., 70 Mich. App. 487, 245 N.W.2d 801 (1976).

See Siedel, *The Constitutionality of No-Fault Insurance: The Courts Speak*, 26 DRAKE L. REV. 794 (1976-1977).

9. *See, e.g.*, Gentile v. Altermatt, 169 Conn. 267, 363 A.2d 1 (1975), *appeal dismissed*, 423 U.S. 1041 (1976); Lasky v. State Farm Ins. Co., 296 So. 2d 9 (Fla. 1974); Andrew v. State, 238 Ga. 433, 233 S.E.2d 209 (1977); Manzanares v. Bell, 214 Kan. 589, 522 P.2d 1291 (1974); Fann v. McGuffey, 534 S.W.2d 770 (Ky. 1975); Pinnick v. Cleary, 360 Mass. 1, 271 N.E.2d 592 (1971); Opinion of the Justices, 113 N.H. 205, 304 A.2d 881 (1973); Rybeck v. Rybeck, 141 N.J. Super. 481, 358 A.2d 828 (1976); Montgomery v. Daniels, 38 N.Y.2d 41, 340 N.E.2d 444, 378 N.Y.S.2d 1 (1975). *See* Siedel, *supra* note 8, at 800-03.

10. 360 Mass. 1, 271 N.E.2d 592 (1971).

insurance plan, the plaintiff argued that he was forced to insure himself through a "private, profit-making corporation," in violation of due process. The Massachusetts Supreme Court disagreed, ruling *inter alia* that state regulation of automobile insurers protected plaintiff's rights. In rejecting plaintiff's argument that the ratemaking scheme violated due process, the court emphasized that the state commissioner of insurance set the rates and that the law provided a review of the rates to any aggrieved party.[11]

In *Gentile v. Altermatt*[12] the plaintiffs challenged the reasonableness of the underwriting guidelines used by the insurers. The Supreme Court of Connecticut concluded that the state's no-fault statute adequately protected plaintiffs' rights to be free of arbitrary, unreasonable, or discriminatory insurance rates. The court determined that the availability of administrative and judicial review of rates and policies at the request of an aggrieved insured and the presence of the state insurance commissioner on the governing board of the Connecticut automobile insurance plan adequately guaranteed the availability of insurance at reasonable rates.[13]

Although the Massachusetts and Connecticut courts briefly considered challenges to their state no-fault regulatory schemes, they did not discuss the basis of the insureds' due process right to reasonable rates and procedures. Nor did the courts explain how individuals may come to be entitled to expect such reasonableness on the part of the private insurance companies with whom they deal. That entitlement was the basis for the Michigan court's decision in *Shavers v. Attorney General.*

B. Other Compulsory Insurance Plans

A workable no-fault insurance plan is necessarily compulsory,[14] and many due process problems that arise in connection with no-fault insurance are due to its compulsory nature. Thus, they are potential problems in any system of compulsory insurance. However, due process challenges to compulsory insurance have usually failed in the courts.

Motor vehicle insurance is probably the oldest form of com-

11. *Id.* at 24-25, 271 N.E.2d at 607-08. *See* Siedel, *supra* note 8, at 800-03.
12. 169 Conn. 167, 363 A.2d 1 (1975), *appeal dismissed*, 423 U.S. 1041 (1976).
13. *Id.* at 291-92, 363 A.2d at 19-20. *See* Siedel, *supra* note 8, at 800-03.
14. R. KEETON & J. O'CONNELL, *supra* note 6, at 341-43.

pulsory insurance in the United States. Commercial vehicles were required to carry liability insurance as early as 1914.[15] In 1927 Massachusetts became the first state to mandate liability insurance for private automobiles.[16] Other states followed,[17] though the majority of states have never had compulsory automobile liability insurance laws. All states have enacted some form of financial responsibility law with respect to motorists.[18]

Although the validity of compulsory automobile liability insurance laws has been questioned in the courts, they have been sustained as proper exercises of state police power.[19] The United States Supreme Court has refused to interfere with such state findings of constitutionality.[20] Due process challenges to the regulatory schemes have failed.[21]

A much more recent type of compulsory insurance is professional liability insurance, most commonly medical malpractice insurance. A Louisiana challenge to hospital-required medical malpractice insurance on due process grounds was dismissed because the court found that the plaintiff had no liberty or property interest sufficient to invoke due process protections.[22] Idaho's state-mandated medical malpractice insurance was also upheld.[23] Although the Idaho court felt that due process protections were applicable, the court held that the state's police power allowed the compulsory insurance. The Supreme Court denied certiorari.[24]

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15. Comment, *Compulsory Liability Insurance for Commercial Motor Vehicles*, 3 LAW & CONTEMP. PROB. 571 (1936).

16. R. KEETON & J. O'CONNELL, *supra* note 6, at 76.

17. New York and North Carolina enacted compulsory automobile liability insurance laws in 1956 and 1957, respectively. *Id.*

18. Note, *The South Carolina Automobile Reparation Reform Act (Part II): Compulsory Insurance—A Synopsis and Appraisal*, 27 S.C.L. REV. 919, 921 (1976) [hereinafter cited as *Compulsory Insurance*]. Financial responsibility laws may not mandate insurance coverage or an indication of financial solvency until a motorist has been involved in an accident or has been shown unable to satisfy an adverse judgment. *Id.* at 922-24.

19. *E.g.*, Opinion of the Justices, 251 Mass. 569, 147 N.E. 681 (1925).

20. *Ex parte* Poresky, 290 U.S. 30 (1933).

21. R. KEETON & J. O'CONNELL, *supra* note 6, at 86-102.

22. Pollock v. Methodist Hosp., 392 F. Supp. 393, 396 (E.D. La. 1975).

23. Jones v. State Bd. of Medicine, 97 Idaho 859, 555 P.2d 399 (1976), *cert. denied*, 431 U.S. 914 (1977).

24. 431 U.S. 914 (1977). Despite the reasoning of the Idaho ruling, similar Kentucky legislation was invalidated as an unjustified exercise of state police power. McGuffey v. Hall, 557 S.W.2d 401 (Ky. 1977). For an examination of the constitutionality of compulsory medical malpractice insurance statutes on substantive due process and equal protec-

Compulsory legal malpractice insurance is less common than medical malpractice insurance, but it has been enacted in British Columbia, Norway, and Oregon, and seriously considered in Washington and California.[25] As with medical malpractice insurance, due process claims challenging the constitutionality of legal malpractice insurance regulatory schemes have not been successful.

One successful challenge to the regulatory scheme of a compulsory insurance plan occurred in *Pennsylvania Coal Mining Association v. Insurance Department.*[26] Pennsylvania coal mining companies were required by statute to self-insure or purchase black lung insurance coverage as a condition of doing business. They challenged a rate increase that went into effect without prior notice or hearing, and the Supreme Court of Pennsylvania agreed that the coal companies had been denied due process of law because of lack of notice and opportunity to voice objections.[27] The court's decision, like that in *Shavers*, was based on the entitlement doctrine.

C. *The Entitlement Doctrine*

The entitlement doctrine stems from the requirement that a person claiming a violation of due process must establish that a protected interest has been encroached by the state.[28] In *Board of Regents v. Roth*,[29] for example, Roth, a state university assistant professor, was hired for one year and then informed that he would not be rehired. Roth argued that due process required that he receive notice of the reasons he was not rehired and an opportunity for a hearing.[30] The Supreme Court held that the decision not to rehire did not infringe any significant liberty or property interests protected by the due process clause.[31] The terms of

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tion grounds, see Muranaka, *Compulsory Medical Malpractice Insurance Statutes: An Approach in Determining Constitutionality*, 12 U.S.F. L. REV. 599 (1978).

25. Comment, *Should Legal Malpractice Insurance Be Mandatory?*, 1978 B.Y.U. L. REV. 102, 112-18. For an argument in support of the plans enacted in Oregon and considered in California, see Boyer, *Legal Malpractice and Compulsory Client Protection*, 29 HASTINGS L.J. 835 (1978).

26. 471 Pa. 437, 370 A.2d 685 (1977).

27. *Id.* at 443, 370 A.2d at 692.

28. *See* Board of Regents v. Roth, 408 U.S. 564, 570-71 (1972); Comment, *Entitlement, Enjoyment, and Due Process of Law*, 1974 DUKE L.J. 89, 94-95 [hereinafter cited as *Entitlement and Due Process*].

29. 408 U.S. 564 (1972).

30. *Id.* at 569.

31. *Id.* at 575, 578.

Roth's appointment did not create any "legitimate claim of entitlement" to reemployment, nor did any state statute or university policy create such an entitlement.[32]

Conversely, a minister deprived of his driver's license without a hearing was held entitled to greater protection in *Bell v. Burson*.[33] The Supreme Court determined that the minister's license represented important interests, in part connected with his pursuit of a livelihood, which gave rise to the protections of procedural due process.[34]

The standards for determining the presence of an entitlement have not been specifically defined by the Supreme Court.[35] It seems clear, however, that the person seeking to establish a protected property interest in a benefit must have "more than an abstract need or desire for" or "unilateral expectation of" the benefit in question.[36] An action by the state, whether it takes the form of a statute, policy, or understanding, is necessary to create the entitlement.[37] Some courts have emphasized the fact that the benefited person has relied on the entitlement received.[38]

In *Pennsylvania Coal Mining Association*, in which the regulatory scheme of a compulsory insurance plan was successfully challenged on due process grounds,[39] the Pennsylvania Supreme Court found the compulsory nature of the insurance, its connection to the pursuit of a livelihood, and the "dependency and reliance" created by the regulatory scheme crucial to its result.

> We conclude that the requirement that the coal mining companies purchase insurance, the importance of the insurance rates to their ability to remain in business, and the purposes of regulation by the Insurance Department create the combination of dependency and reliance which makes applicable the protections of procedural due process.[40]

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32. *Id.* at 577-78.

33. 402 U.S. 535 (1971).

34. *Id.* at 539.

35. Shavers v. Attorney Gen., 402 Mich. at 646-47, 267 N.W.2d at 110 (Ryan, J., concurring in part, dissenting in part).

36. Board of Regents v. Roth, 408 U.S. at 577.

37. *Id.* at 578; Perry v. Sindermann, 408 U.S. 593, 602-03 (1972); *Entitlement and Due Process, supra* note 28, at 98.

38. Board of Regents v. Roth, 408 U.S. at 577, Pennsylvania Coal Mining Ass'n v. Insurance Dep't, 471 Pa. at 447-49, 370 A.2d at 690.

39. *See* notes 26-27 and accompanying text *supra*.

40. 471 Pa. at 449, 370 A.2d at 691.

One requirement articulated in connection with the entitlement doctrine, but not mentioned in the *Pennsylvania Coal Mining Association* case, is that of "present enjoyment": the person must already possess the benefit in question and be threatened with its deprivation. If a person is simply seeking to acquire a benefit, there is no present enjoyment.[41]

The present enjoyment requirement, which draws a distinction between the due process protection of rights already received and benefits not yet conferred, has been criticized.[42] In connection with *Bell v. Burson*,[43] in which the Supreme Court stressed that procedural due process protections attach only after a driver's license is issued,[44] one commentator has pointed out:

> The Court correctly emphasized the importance of the right to operate an automobile in modern society. But how is it that only "[o]nce licenses are issued" that they become "essential in the pursuit of a livelihood"? Clearly, the *need* for a license as an important concomitant of a full and active life is not necessarily any different for an initial applicant than for a license holder who is threatened with revocation proceedings.[45]

Thus, three factors must be considered in determining whether a party has a protected interest in a state-administered benefit, as the entitlement doctrine is currently applied[46]: first, there must be a legitimate claim of entitlement to the benefit based on some form of state action; second, the party must rely on the benefit; and third, the party must presently enjoy the benefit.

II. THE INSTANT CASE

Justice Williams, writing for the court in *Shavers v. Attorney General*, characterized the critical issue as whether the present regulatory scheme for compulsory no-fault insurance gave motorists due process protection with regard to the fairness of insurance

41. Paul v. Davis, 424 U.S. 693, 710-12 (1976); Board of Regents v. Roth, 408 U.S. at 576; *Entitlement and Due Process, supra* note 28, at 101-02.

42. *Entitlement and Due Process, supra* note 28, at 111-14.

43. 402 U.S. 535 (1971).

44. *Id.* at 539.

45. *Entitlement and Due Process, supra* note 28, at 112 (footnote omitted).

46. For a criticism of the current application of the entitlement doctrine and a proposed model of procedural due process, see Saphire, *Specifying Due Process Values: Toward a More Responsive Approach to Procedural Protection*, 127 U. PA. L. REV. 111 (1978).

rates and the proper availability of insurance.[47] He then discussed two requirements that must be satisfied before the due process clause can be invoked: first, there must be state action; second, the allegedly deprived right must fall within the protected areas of "life, liberty, or property."[48]

The Michigan court determined that the actions of the insurance companies in the context of the No-Fault Act did constitute state action. Noting that the Act compels no-fault insurance at the risk of civil and criminal penalities, and that it details the extent of coverage, conditions of payment, and assignment of claims and risks, the court found that the "insurance companies are the instruments through which the Legislature carries out a scheme of general welfare."[49] Distinguishing the insufficient interest in utility rates held by customers attempting to invoke due process,[50] the court concluded that since the Michigan legislation went "beyond a grant of a monopoly or an attempt to regulate a utility,"[51] the actions of the insurance companies were, in effect, the actions of the state.

The question of the relationship between fair rates and procedures and the due process clause was more difficult to address. The issue facing the court was whether the plaintiffs had a protected property interest, under the entitlement doctrine, in the benefit conferred by the state. The court articulated the test it applied: "The existence of interests or benefits entitled to due process protection depends on the extent to which government activity has fostered citizen dependency and reliance on the activity."[52]

The court found that the government had fostered extensive citizen reliance on fairly administered no-fault insurance. Noting that the mobility provided by a car is a practical necessity in the day-to-day lives of most Michigan residents, Justice Williams compared compulsory no-fault insurance to a driver's license. A driver's license, once issued, represents an interest subject to due process protections.[53] A driver's license is of little use unless the licensee is allowed to register and operate a motor vehicle. There-

47. 402 Mich. at 594-95, 267 N.W.2d at 85.
48. *Id.* at 597-98, 267 N.W.2d at 86.
49. *Id.* at 597, 267 N.W.2d at 86.
50. *Id.* (citing Jackson v. Metropolitan Edison Co., 419 U.S. 345, 351 (1974)).
51. *Id.*
52. *Id.* at 598, 267 N.W.2d at 86 (citing Board of Regents v. Roth, 408 U.S. at 577).
53. Bell v. Burson, 402 U.S. at 539.

fore, according to the court, the interest in registering and operating a motor vehicle is subject to due process protections. Because one cannot register or operate a motor vehicle in Michigan without no-fault insurance, the interest in fairly administered no-fault insurance is subject to due process protections.[54]

The court further concluded that the legislature had "fostered the expectation that no-fault insurance will be available at fair and equitable rates,"[55] quoting sections of the Michigan Insurance Code which state that "[r]ates shall not be excessive, inadequate or unfairly discriminatory"[56] and that no-fault insurance coverage "will be available to any person who is unable to procure insurance through ordinary methods."[57]

The court determined that the No-Fault Act, as administered, did not satisfy due process requirements. Motorists could be refused insurance, have their insurance cancelled, or be assigned to the Automobile Placement Facility without effective legal procedures available to challenge the action. In addition, the rates proposed by the insurance companies and approved by the state's insurance commissioner could not be challenged until after they had become effective. That rule forced insured motorists to pay rates, even if they thought the rates unfair, while they challenged them. Also, motorists assigned to the Automobile Placement Facility did not have the same coverage options that were available to other motorists.[58]

Having determined that the present administrative scheme did not satisfy the requirements of due process, the court proceeded to outline the standards for a law that would satisfy due process.[59] It was not enough that the legislature required fair procedures and then left the major determination of the procedures to private insurance companies. The legislature or the insurance commissioner must make sufficiently definite rules in order to raise the legislative mandate of fair rates and procedures above the level of exhortation.[60] The court, however, did allow eighteen months, during which the No-Fault Act would remain in effect,

54. 402 Mich. at 599, 267 N.W.2d at 87.
55. *Id.*
56. MICH. COMP. LAWS ANN. § 500.2403(1)(d) (West Supp. 1979-1980).
57. *Id.* § 500.3301(1)(a).
58. 402 Mich. at 601-05, 267 N.W.2d at 88-90.
59. *Id.* at 607-08, 267 N.W.2d at 91.
60. *Id.* at 601-02, 267 N.W.2d at 88.

for the legislature and insurance commissioner to take corrective action.[61]

Three of the seven justices wrote separate opinions, concurring in part and dissenting in part. All three dissenting justices criticized the majority for deciding the due process issue, which was not raised as an issue on appeal.[62] The dissenters felt that the majority's justification for deciding the issue—the majority stated that they felt "compelled to address [the due process issue] because of its basic, threshold importance to any decision [they] might render as to the No-Fault Act's constitutionality"[63] and that "[a]fter five years of uncertainty as to the constitutionality of the No-Fault Act, [they] believe the people of the State of Michigan deserve an opinion which addresses this crucial constitutional challenge to the No-Fault Act's regulatory scheme head on"[64]—was an unsatisfactory basis for the exercise of judicial review.

Although the dissent contended that there was no factual record to show that Michigan motorists were unable to obtain insurance at fair rates,[65] the court did have access to a report to the Governor on "Essential Insurance in Michigan."[66] That document disclosed deficiencies in the Michigan automobile and homeowners' insurance systems. The report found that the automobile insurance system failed to guarantee that essential insurance would be available to consumers meeting minimum standards of insurability.[67] The system also failed to guarantee competitive, fair prices or to guarantee the consumer freedom of choice of companies, coverage, and prices.[68] Nor was the system found to be cost effective. Practices of the insurance industry, perhaps justified by the status of insurance companies as private economic enterprises,[69] were found to be based on subjective fac-

61. *Id.* at 581, 267 N.W.2d at 78.

62. *Id.* at 641-43, 267 N.W.2d at 107-08 (Ryan, J., concurring in part, dissenting in part); *id.* at 667-68, 267 N.W.2d at 118-19 (Fitzgerald, J., concurring in part, dissenting in part); *id.* at 670, 267 N.W.2d at 120 (Coleman, J., concurring in part, dissenting in part).

63. *Id.* at 593 n.14, 267 N.W.2d at 84 n.14.

64. *Id.*

65. *Id.* at 646, 267 N.W.2d at 109 (Ryan, J., concurring in part, dissenting in part).

66. INSURANCE BUREAU, MICH. DEP'T OF COMMERCE, ESSENTIAL INSURANCE IN MICHIGAN (1977) [hereinafter cited as ESSENTIAL INSURANCE].

67. *Id.* at 33, 37.

68. *Id.*

69. *Id.* at 9.

tors that could not be objectively defended.[70] Because Michigan automobile insurance is compulsory, the report considered the resulting inequities intolerable.[71] The insurance commissioner's report to the Governor was cited twice by the majority[72] and once by the dissent[73] and may have replaced the missing "factual record."

Only Justice Ryan's separate opinion directly confronted the majority's use of the entitlement doctrine and what Justice Ryan saw as a mistaken application of the doctrine to the facts of the case. He found no constitutionally protected interest in fair insurance rates,[74] nor did he find any statutory provision that created an entitlement to such protection.[75] He concluded that the majority overlooked the requirement of present enjoyment of the protected property interests, an important aspect of the entitlement doctrine.[76] Explaining that only *potential* unfairness had been adjudicated by the majority, Justice Ryan stated that the actions of the court constituted a usurpation of the legislative function.[77]

III. Analysis

If the Michigan court was correct in finding a protected due process interest in fair rates and procedures for no-fault insurance, then, according to the court's standards, citizens would be entitled to administrative review of the basis for refusal or cancellation of insurance.[78] The resulting burdens on state regulatory agencies and insurance companies, and the resulting boon to insured or potentially insured parties, require a careful evaluation of the court's reasoning.

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70. *Id.* at 26.

71. *Id.* at 9. The industry practices found to limit the fair availability of insurance to Michigan consumers were whimsical, inconsistent underwriting and cancellation practices that forced undeserving consumers into the assigned risk category, *id.* at 10-11, 25-26; *see Compulsory Insurance*, *supra* note 18, at 932-33, and the practice of charging premiums based on invalid classifications, thus creating wide ranges in premiums charged for objectively similar risks, *id.* at 11-12, 24-25.

72. 402 Mich. at 602 n.25, 605 n.28, 267 N.W.2d at 88 n.25, 90 n.28.

73. *Id.* at 668 n.3, 267 N.W.2d at 119 n.3 (Fitzgerald J., concurring in part, dissenting in part).

74. *Id.* at 651, 267 N.W.2d at 112 (Ryan, J., concurring in part, dissenting in part).

75. *Id.* at 653-54, 267 N.W.2d at 113.

76. *Id.* at 650, 267 N.W.2d at 111.

77. *Id.* at 657, 267 N.W.2d at 114.

78. *Id.* at 608, 267 N.W.2d at 91.

A. The Court's Use of the Entitlement Doctrine

1. The basis for the entitlement in state action

The majority found a claim of right to fair insurance rates and procedures under Michigan law in the statutory mandate that "[r]ates shall not be excessive, inadequate or unfairly discriminatory," and in the Insurance Code provision that guarantees the availability of no-fault coverage.[79] Justice Ryan's dissent stressed that a statute creating an entitlement must specifically define the conditions under which the benefit in question may be granted or denied.[80] An examination of the authorities cited in support of that proposition reveals, however, that although such specific statutes were being adjudicated in the cited cases, there is no holding that such specificity is a requirement under the entitlement doctrine.[81]

Justice Ryan explained one of the provisions in which the majority found a claim of right as a mere standard for the insurers and insurance commissioner to follow.[82] However, the majority is probably correct in its holding that "[t]he Legislature has . . . fostered the expectation that no-fault insurance will be available at fair and equitable rates."[83] The compulsory nature of the insurance appears to elevate that expectation to the status of a right under state law.[84]

2. Reliance on the benefit

The majority emphasized that a person relies on the "independent mobility provided by an automobile" as a "crucial, practical necessity."[85] Although the dissent explained that "the element of citizen reliance standing alone is not sufficient to create the entitlement interest to which due process protections attach,"[86] the element of reliance does seem to be a factor in sup-

79. *Id.* at 599, 267 N.W.2d at 87 (citing MICH. COMP. LAWS §§ 500.2403(1)(d), .3301(1)(a)).

80. *Id.* at 647, 267 N.W.2d at 110 (Ryan, J., concurring in part, dissenting in part).

81. *Id.* at 647 n.6, 267 N.W.2d at 110 n.6 (citing Arnett v. Kennedy, 416 U.S. 134 (1974); Goldberg v. Kelly, 397 U.S. 254 (1970)). *See also* Pennsylvania Coal Mining Ass'n v. Insurance Dep't, 471 Pa. at 447-49, 370 A.2d at 690.

82. 402 Mich. at 654, 267 N.W.2d at 113 (Ryan, J., concurring in part, dissenting in part).

83. *Id.* at 599, 267 N.W.2d at 87.

84. *Id.*

85. *Id.* at 598, 267 N.W.2d at 87.

86. *Id.* at 648, 267 N.W.2d at 110 (Ryan, J., concurring in part, dissenting in part).

porting a claim of entitlement.[87] It shows that the claimant may be one of those "helpless . . . persons who are in a dependent relationship to government with respect to basic needs."[88] The ability to operate one's car, once the right to do so has been obtained through the issuance of a driver's license, may become such a basic need, as has been suggested by the Supreme Court in *Bell v. Burson*: "Once licenses are issued, . . . their continued possession may become essential in the pursuit of a livelihood."[89]

3. Present enjoyment

Despite satisfaction of the entitlement doctrine's requirements of state action and reliance on the benefit, the majority's argument ignored the present enjoyment requirement. Its finding of a protected interest stemmed from the holding in *Bell v. Burson*. The Michigan court argued that a driver's license is of little use unless the licensee can register and operate a motor vehicle. Therefore, the interest in registering and operating a motor vehicle is as significant as the interest in the use of a driver's license. Because no-fault insurance is required in order to register and operate a motor vehicle, the court reasoned, there must be a protected interest in obtaining the compulsory insurance at fair rates and in being fairly treated by the insurance companies.[90]

While the court's analysis makes sense as a logical syllogism, it wreaks havoc with the requirement of present enjoyment. The dissent in *Shavers* made a strong argument that satisfaction of the present enjoyment requirement is essential.[91] The dissent pointed out:

> An individual does not possess, in the abstract, a property interest in the operation of his vehicle upon Michigan's highways. Rather, the property interest lies in his status as a registrant or licensee recipient of the entitled benefit. Until an individual acquires such licensure or proves his eligibility for it, he does not have a legitimate claim of entitlement to it. Essen-

87. *See* notes 38-40 and accompanying text *supra*.

88. L. TRIBE, AMERICAN CONSTITUTIONAL LAW 515-16 (1978).

89. 402 U.S. at 539.

90. *Id.* at 599, 267 N.W.2d at 87.

91. *Id.* at 650-51, 267 N.W.2d at 111 (Ryan, J., concurring in part, dissenting in part) (citing Board of Regents v. Roth, 408 U.S. at 576; Bell v. Burson, 402 U.S. at 539; Scarpa v. United States Bd. of Parole, 477 F.2d 278, 282 (5th Cir. 1973)). *See also* Paul v. Davis, 424 U.S. 693, 708-10 (1976).

> tially, the requirement of no-fault insurance simply conditions or defines one aspect of the eligibility for the benefit. Until an individual fulfills the eligibility requirement of obtaining no-fault insurance, he does not have a valid claim of entitlement to operate his vehicle in Michigan.[92]

The concept of entitlement could be applied to those who already possess no-fault insurance, allowing the majority's due process requirements concerning (1) fair rates once insurance is obtained, (2) cancellation, or (3) reassignment to the Automobile Placement Facility.[93] Nevertheless, under the entitlement doctrine, the requirement of present enjoyment would forestall the court's grant of due process protection in terms of initial (1) rates, (2) refusal, or (3) assignment to the Automobile Placement Facility.[94]

The requirement of present enjoyment under the entitlement doctrine does serve an ascertainable purpose. The courts seem unwilling to allow every person who applies for a government-granted benefit to enjoy due process protections if the benefit is refused. The endless numbers of hearings necessary for those denied noncommercial hunting and fishing licenses, parade permits, bonfire permits, and the like undoubtedly loom large in the minds of those who must apply the entitlement doctrine. Nevertheless, the appropriate line to draw is not always between those who presently enjoy government-granted benefits and those who do not. Such a distinction is unnecessarily artificial[95] and encourages those who grant benefits to be more selective in their decisions to accept applications, since once a benefit is granted it will be difficult to revoke.[96]

Despite the fact that the application of the present enjoyment doctrine may be appropriate in some cases, the majority in *Shavers* was justified in ignoring the doctrine. The appropriate distinction in the instant case should not be based upon the difference between those who have already acquired no-fault insurance and those who have not. The benefit is as important to a person who needs it, but has not yet acquired it, as it is to a person who has acquired the benefit. The crucial issue is the

92. 402 Mich. at 651, 267 N.W.2d at 112 (Ryan, J., concurring in part, dissenting in part).

93. *See id.* at 605-08, 267 N.W.2d at 90-91.

94. *See id.*

95. *See* notes 42-45 and accompanying text *supra*.

96. *Entitlement and Due Process*, *supra* note 28, at 116-17.

compulsory nature of the insurance, not as a benefit, but as a government-administered requirement necessary to an important part of normal adult life and the pursuit of a livelihood.[97]

B. The Uniqueness of Compulsory Insurance

The problems of the Michigan law addressed by the court in *Shavers* were the lack of procedures to challenge allegedly arbitrary and discriminatory refusal and cancellation practices or placement in the assigned risk category, and the lack of guaranteed fair rates and a variety of coverage options in the assigned risk category.[98] Such problems are not unique to no-fault insurance. They are potential problems in any system of compulsory or essential insurance.[99] The problems recognized by the court do not result because the insurance is of the no-fault type; they are due to its compulsory nature. If a state relies on private insurance companies to provide compulsory insurance to its citizens, then the state must require fair dealing on the part of those profit-seeking organizations, and legislate the procedures to ensure such fair dealing. The grant of a virtual monopoly to a private industry exempt from federal antitrust regulation[100] in an area so intricately linked with an individual's personal freedom and pursuit of a livelihood requires a state vigilance that transcends the requirements of the entitlement doctrine. Though such protection would ideally stem from legislative action, the courts have a responsibility to protect the rights of individuals in this area, since individuals do not possess the lobbying power enjoyed by the insurance companies.

C. Remedial Legislation Proposed to the Michigan Legislature

As of July 1979 four bills dealing with concerns raised by the Michigan court's decision in *Shavers v. Attorney General* were being considered by the Michigan Legislature. Each house of the legislature was considering two bills relevant to the *Shavers* decision.

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97. One commentator suggests a balancing approach. *Id.* at 118-22.

98. 402 Mich. at 604-05, 267 N.W.2d at 89-90.

99. For example, such problems with homeowners' insurance are discussed generally in ESSENTIAL INSURANCE, *supra* note 66.

100. 15 U.S.C.A. § 1012 (1976).

1. Bills being considered in the Michigan House of Representatives

Two bills proposed to the Michigan House of Representatives were still in the Committee on Insurance in July 1979. One of them, H. 4650,[101] provides that "for the purpose of rating automobile insurance based upon groupings of insureds or insured automobiles using territorial or locational criteria, a territory shall not be smaller than the entire state."[102] The bill appears to be directed at avoiding unfairly discriminatory rates, in keeping with the minimum requirements of the *Shavers* court.[103]

H. 4453[104] involves more extensive reform of Michigan's insurance system. It creates a "Michigan Indemnity Association" to guarantee availability of essential motor vehicle and home insurance to Michigan consumers.[105] The indemnity association is a reinsurance facility,[106] and does away with the need for the Automobile Placement Facility assigned risk plan.[107] The indemnity association, by allowing insureds to choose the agent, company, and coverage they want, successfully addresses the *Shavers* court's concerns about the variety of coverage options in the residual market.[108] The bill does not provide an opportunity for the insured to challenge his or her placement in the residual market. However, the limitation on rates charged to high risks ceded to the indemnity association, the careful definition of "high risk,"[109] and the limitation on the number of policies an insurer may cede to the association[110] may satisfy the demands of due process.

The bill also forbids ratemaking decisions for essential insurance based on sex, marital status, age, residence, or location of

101. H. 4650, 80th Mich. Leg., 1979 Reg. Sess. (1979).

102. *Id.* § 2405.

103. *See* 402 Mich. at 607, 267 N.W.2d at 91.

104. H. 4453, 80th Mich. Leg., 1979 Reg. Sess. (1979).

105. *Id.* § 2103.

106. *Id.* § 2105. A reinsurance facility, in the context of motor vehicle insurance, allows drivers to choose the agent and company from which they want coverage. Companies not wishing to insure certain risks reinsure them through a-central pool, and connected losses are shared on a proportionate basis by all insurance companies writing motor vehicle insurance. *Compulsory Insurance, supra* note 18, at 934 n.70. *See* H. 4453, 80th Mich. Leg., 1979 Reg. Sess. §§ 2104, 2120 (1979).

107. H. 4453, 80th Mich. Leg., 1979 Reg. Sess. § 2122 (1979).

108. *See* 402 Mich. at 607-08, 267 N.W.2d at 89-90.

109. H. 4453, 80th Mich. Leg., 1979 Reg. Sess. § 2105A (1979).

110. *Id.* § 2105.

the risk, and allows the insurance commissioner to make rules to implement the restrictions.[111] That provision appears to respond to the *Shavers* court's instruction that the legislature give meaning to the prohibition of discriminatory rates.[112] In addition, the bill strikes the provision that allowed rating classifications based on differences among risks that might have a probable effect on losses and expenses, a provision that allowed rates to be established on "insubstantial bases which do not satisfy due process."[113]

H. 4453 does not, however, address some important concerns of the *Shavers* court. While it does provide for administrative review of rates that are already in effect,[114] it does not provide opportunity for an aggrieved party to complain before the rates become effective. This condition was considered a denial of due process by the *Shavers* court.[115] The bill also fails to require that filings and supportive information be available to the public before the rates take effect. This condition was considered to be "questionable due process" by the *Shavers* court.[116]

H. 4453 does require agents to furnish potential insureds with "a representative set of quotations of premiums at which companies represented by the agent will issue policies for essential insurance."[117] It also sets out factors to be considered when determining rates.[118] However, it does not explicitly provide that the factors used to determine premiums be publicized so that an individual may calculate his probable premiums, a requirement of minimum due process according to the *Shavers* court.[119]

Thus, while H. 4453 would be a progressive step toward assuring due process to consumers of no-fault insurance in Michigan, it is not completely in harmony with the requirements of the *Shavers* court.

2. *Bills being considered in the Michigan Senate*

As of July 1979 the two automobile insurance bills being

111. *Id.* § 2106(2).
112. *See* 402 Mich. at 607, 267 N.W.2d at 91.
113. *Id.* at 602, 267 N.W.2d at 88 (footnote omitted).
114. H. 4453, 80th Mich. Leg., 1979 Reg. Sess. § 2106(3) (1979).
115. 402 Mich. at 602-03, 267 N.W.2d at 88-89.
116. *Id.* at 602, 267 N.W.2d at 88.
117. H. 4453, 80th Mich. Leg., 1979 Reg. Sess. § 2120(A) (1979).
118. *Id.* §§ 2108, 2403.
119. 402 Mich. at 608, 267 N.W.2d at 91.

considered by the Michigan Senate were in the Committee on Commerce. S. 127[120] adds a section to the Michigan Insurance Code requiring agents whose contract with an insurer is cancelled to inform insured parties that they may be able to continue coverage with the same insurer through another agent.[121] The bill does not deal solely with essential insurance, but it would prevent some cases of inadvertent or unfair policy nonrenewal.

S. 243[122] directly addresses the concerns of the Michigan Supreme Court, as explained in *Shavers*. The bill moves "residence" and "location of the risk" from a list of factors that could be considered if reasonably related to the extent of risk or coverage, to a list of factors that may not be considered in refusing coverage.[123] The bill also disallows refusal of coverage because the applicant was formerly an "assigned risk."[124] These changes in the law are responsive to the Michigan court's concern that insurance be fairly available to consumers, as the legislature guaranteed.[125]

The proposed legislation also clarifies the meaning of the provision prohibiting "unfairly discriminatory" rates,[126] pursuant to the *Shavers* court's minimum due process requirements.[127] Also in keeping with the court's requirements, the bill includes provisions specifying the supportive information to be included with rate filings[128] and requiring that rate filings and supportive information be immediately opened to public inspection and publicized by the insurance commissioner.[129]

S. 243 responds to the *Shavers* court's concerns regarding the Automobile Placement Facility assigned risk plan[130] by mandating that the same variety of coverages be available through the facility as are available in the nonresidual market.[131] It also requires that a rate classification plan for "clean risks" be filed with the commissioner and that only commissioner-approved rates

120. S. 127, 80th Mich. Leg., 1979 Reg. Sess. (1979).
121. *Id.* § 1210(1).
122. S. 243, 80th Mich. Leg., 1979 Reg. Sess. (1979).
123. *Id.* § 2027(a).
124. *Id.* § 2027(c).
125. *See* 402 Mich. at 599, 267 N.W.2d at 87.
126. S. 243, 80th Mich. Leg., 1979 Reg. Sess. § 2403(d) (1979).
127. *See* 402 Mich. at 607-08, 267 N.W.2d at 91.
128. S. 243, 80th Mich. Leg., 1979 Reg. Sess. § 2406(1) (1979).
129. *Id.* § 2406(2).
130. 402 Mich. at 604-05, 267 N.W.2d at 89-90.
131. S. 243, 80th Mich. Leg., 1979 Reg. Sess. § 3320(1)(b)(ii) (1979).

and rules be used on facility policies.[132]

The bill's provisions regarding hearings are particularly responsive to the requirements of the *Shavers* court. The bill allows aggrieved parties to apply for a hearing before the insurance commissioner in case of refusal, limitation, or nonrenewal of coverage based on prohibited factors.[133] Although the bill does not specifically allow a challenge to assignment to the Automobile Placement Facility, the hearing for refusal of insurance based on prohibited factors would allow such a challenge. In direct response to the concerns of the Michigan court,[134] the bill allows aggrieved parties to apply for a hearing with regard to a *proposed* rate filing as well as an effective rate filing.[135]

S. 243 appears to satisfy the concerns of the *Shavers* court and to provide due process to Michigan consumers with regard to no-fault automobile insurance. If enacted by the Michigan Legislature, it will be an important step toward an automobile insurance system that is fundamentally fair to consumers and to the insurance industry.

D. Indications for Action in Other States and at the Federal Level

At present, few states adequately protect their citizens in the no-fault automobile insurance area. For example, although twenty-four states provide some form of no-fault automobile liability insurance,[136] only Colorado, Connecticut, Hawaii, Kansas,

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132. *Id.* § 3340.

133. *Id.* § 2027(3).

134. 402 Mich. at 601-03, 267 N.W.2d at 88-89.

135. S. 243, 80th Mich. Leg., 1979 Reg. Sess. § 2420 (1979).

136. ARK. STAT. ANN. §§ 66-4014 to -4021 (Supp. 1977); COLO. REV. STAT. §§ 10-4-701 to -723 (1974 & Supp. 1976); CONN. GEN. STAT. ANN. §§ 38-319 to -351 (West Supp. 1979); DEL. CODE ANN. tit. 21, § 2118 (Supp. 1978); FLA. STAT. ANN. §§ 627.730-.741 (West 1972 & Supp. 1979) (repealed effective July 1, 1982); GA. CODE ANN. §§ 56-3401b to -3414b (1977 & Supp. 1978); HAW. REV. STAT. §§ 294-1 to -41 (1976 & Supp. 1978); KAN. STAT. ANN. §§ 40-3101 to -3121 (Supp. 1978); KY. REV. STAT. §§ 304.39-010 to -340 (Supp. 1978); MD. ANN. CODE art. 48A, §§ 538-547 (1979); MASS. GEN. LAWS ANN. ch. 90, §§ 34A-34N, ch. 231, § 6D (West 1969 & Supp. 1979); MICH. COMP. LAWS ANN. §§ 500.3101-.3179 (Supp. 1979-1980); MINN. STAT. ANN. §§ 65B.41-.71 (West Supp. 1979); NEV. REV. STAT. §§ 698.010-.510 (1973 & 1977); N.J. STAT. ANN. §§ 39.6A-1 to -20 (West 1973 & Supp. 1979-1980); N.Y. INS. LAW §§ 670-678 (McKinney Supp. 1978-1979); N.D. CENT. CODE §§ 26-41-01 to -19 (1978); OR. REV. STAT. §§ 743.800-.835 (1977); PA. STAT. ANN. tit. 40, §§ 1009.101-.701 (Purdon Supp. 1979-1980); S.C. CODE §§ 56-11-110 to -790 (1977 & Supp. 1978); S.D. COMP. LAWS ANN. §§ 58-23.6 to .8 (1978); TEX. INS. CODE ANN. tit. 14, § 5.06-3 (Vernon Supp. 1963-1978); UTAH CODE ANN. §§ 31-41-1 to -13.4 (1974 & Supp. 1977); VA. CODE § 38.1-380.1 (Supp. 1979).

Massachusetts, Michigan, Minnesota, and Pennsylvania provide for a hearing to aggrieved applicants or insureds.[137] Legislators in no-fault states may wish to examine the opinion of the Michigan court in *Shavers v. Attorney General*, the Michigan Insurance Bureau's report on essential insurance,[138] and the bills proposed in the Michigan Legislature[139] for ideas on reforming their own statutes.

The federal no-fault legislation introduced in the last session of Congress,[140] supposedly based on the Michigan law that was invalidated by the *Shavers* case,[141] contains the same flaws detected by the court in *Shavers*. The national bill requires that the compulsory insurance be available[142] and sanctions insurance companies who unfairly cancel, fail to renew, or modify an insured's policy.[143] However, the proposed act does not provide procedures to be followed by an insured who feels that he or she has been unfairly treated, nor does it provide procedures for those who have been refused insurance to challenge the refusal. There is an assigned risk plan required by the bill,[144] but it does not provide procedures to be followed by aggrieved insureds, nor does it mandate that residual coverage be comparable in quality to nonresidual coverage.[145] If the federal legislation is considered by future sessions of Congress,[146] the constitutional infirmities high-

137. COLO. REV. STAT. § 10-4-720 (1974); CONN. GEN. STAT. ANN. § 38-345 (West Supp. 1979); HAW. REV. STAT. §§ 294-13, -25, 431-695, -699 (1976 & Supp. 1978); KAN. STAT. ANN. § 40-3118 (Supp. 1978); MASS. GEN. LAWS ANN. ch. 90, § 34H (West Supp. 1979); MICH. COMP. LAWS ANN. § 500.2420 (1967); MINN. STAT. ANN. §§ 65B.12, .19 (West Supp. 1979); PA. STAT. ANN. tit. 40, § 1008.5 (Purdon Supp. 1979-1980).

138. ESSENTIAL INSURANCE, *supra* note 66.

139. Notes 101, 104, 120, 122 *supra*.

140. S. 1381, 95th Cong., 1st Sess., 123 CONG. REC. S6339 (daily ed. Apr. 25, 1977); H.R. 6601, 95th Cong., 1st Sess., 123 CONG. REC. H3537 (daily ed. Apr. 25, 1977).

141. *Michigan no-fault ruling endangers federal bill*, 64 A.B.A.J. 955 (1978); 21 ATLA L. REP. 242 (1978).

142. S. 1381, 95th Cong., 1st Sess. § 104(c), 123 CONG. REC. S6339, S6343 (daily ed. Apr. 25, 1977).

143. *Id.* § 108, 123 CONG. REC. at S6344. The proposed sanction is $50 per occurrence.

144. *Id.* § 106, 123 CONG. REC. at S6343. The statute does not specifically mandate an assigned risk plan, as opposed to some other type of residual facility (*e.g.*, reinsurance plan), but the residual facility is described in terms of an assigned risk plan.

145. The idea that all drivers in the assigned risk category are bad drivers and therefore may "deserve" harsh treatment is not borne out by the fact that many "clean" risks are forced into the assigned risk category. *See* note 71 *supra*.

146. S. 1381 and H.R. 6601 were not passed by the 95th Congress. *See* 47 U.S.L.W. 2088 (1978). As of July 1979 no national no-fault bill had been introduced in the 96th Congress.

lighted by the Michigan court in *Shavers* should be cured, and the possible reforms outlined in the Michigan insurance commissioner's report to the Governor should be considered.[147]

If the problem with no-fault insurance lies in its compulsory nature, it may be argued that the solution must lie in abolishing compulsory automobile liability insurance altogether. Since an adequate no-fault system must be compulsory,[148] the proposed solution would do away with no-fault insurance. This solution is undersirable for two reasons. First, a well-administered no-fault system is superior to the traditional fault-based reparations scheme. As the federal no-fault bill proposed in the 95th Congress explains,

> [the] traditional fault system denies more than half of the victims of motor vehicle accidents in the United States any benefits; is inefficient, incomplete, and slow; allocates benefits poorly; discourages rehabilitation; overburdens the courts; and does little if anything to minimize crash losses. . . . An adequate no-fault system delivers benefits to all victims rapidly and fairly; is efficient; provides for emergency medical services that can save lives and for rehabilitation services that can restore victims to productive lives; removes an unnecessary burden on the courts; contains incentives for improving motor vehicle safety; and is a desirable replacement for a traditional fault system or an inadequate no-fault system.[149]

Second, even if automobile insurance is not made compulsory by a state, it is a practical necessity for any responsible driver.[150] The goal of fairly administered no-fault insurance can be effectively achieved through the private insurance delivery system without burdensome government interference.[151]

IV. Conclusion

The Michigan Supreme Court incorrectly applied the entitlement doctrine to complusory no-fault automobile insurance in *Shavers v. Attorney General*. A correct application of the doctrine of present enjoyment would preclude the court's holding that certain procedural due process protections are required for Michi-

147. Essential Insurance, *supra* note 66.

148. R. Keeton & J. O'Connell, *supra* note 6, at 341-43.

149. S. 1381, 95th Cong., 1st Sess. § 2(5), (9), 123 Cong. Rec. S6339, S6341 (daily ed. Apr. 25, 1977).

150. Essential Insurance, *supra* note 66, at 3-4.

151. *Id.* at 61-75.

gan citizens seeking automobile insurance. Nevertheless, the court reached a desirable result. The compulsory nature of the insurance, the self-interest of the private insurance companies that provide the insurance, and the close connection of the insurance to personal freedom and pursuit of one's livelihood require that procedural due process protections be afforded those who seek compulsory insurance as well as those who currently enjoy its benefits. Other courts should follow the lead of the Michigan court and reconsider current application of the doctrine of entitlement to certain types of compulsory government-administered benefits, such as no-fault automobile insurance.

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